Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 04-928

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

Petition for Writ of Certiorari to the Oregon Supreme Court

JOINT APPENDIX VOLUME II

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PETITION FOR CERTIORARI FILED January 5, 2005
CERTIORARI GRANTED April 25, 2005

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Case No. 87CR0373TM

Plaintiff,

v.

RANDY LEE GUZEK,

Defendant.

TRANSCRIPT OF PROCEEDINGS
Hearing Motions

Day of: May 21st, 1997
9:00 a.m.

BEFORE: THE HONORABLE PIERRE L. VAN RYSSELBERGHE
APPEARANCES:

For the Plaintiff: MR. JOSH MARQUIS
District Attorney
MR. F.J. MALONEY
Deputy District Attorney
Bend, Oregon

For the Defendant: MR. DUANE MCCABE
Attorney at Law
MR. JONATHAN ASH
Attorney at Law
Bend, Oregon

Reporter: Linda Phillips

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THE COURT: Mr. Marquis, did you have any other matters you wanted to raise at this time?

MR. MARQUIS: The only two issues, one had to do -- I guess if it's necessary, the state will file a motion in liminie, we will do that, if there is any question about the idea of Mr. Guzek being able to relitigate his guilt.

It's an interesting issue as to whether decisions made by a prior judge in a case have any law of the case kind [Page 85] of holding. They may not. I don't know. Your Honor is probably not bound by all those same decisions.

That leads into my other concern which was that has to do with the duration of the trial. We had some brief discussion about this in chambers. The state intends to put on essentially the case it did last time. I believe we took about ten days to two weeks to present our evidence. And with the small amount of additional evidence, I can't imagine taking longer than that. I expect that the jury selection will take about a week. And I have always assumed from our conversations that the defense would take two to three weeks to present its case which means about a six week at most case.

I was a little concerned because I saw in the jury questionnaire that it said that it might take more than two months and I was really concerned when we talked in chambers and Mr. McCabe made reference to the Hernandez case which took seven months. Obviously both for the court's scheduling and for Your Honor's and Deschutes County Court, I think we have to have some grip on where it's at. Frankly, my ability to be the prosecutor in this case would be hampered if it took six months. As the court knows, I'm the district attorney in another county and I'm trying this as a special prosecutor. There is no financial issue involved, but I have a constituency and a jurisdiction. Now Mr. McCabe may

say [Page 86] that's the state's problem, they can choose whomever they want as a prosecutor. That's true, but I'm concerned about Mr. McCabe indicating that there is some huge open end for the trial and that we would be in trial into 1998.

Along those same lines, I'm also asking the court I guess to place a discovery deadline, at least a preliminary one, which the state intends to honor as well in terms of presentation of witness lists both from the state to the defense and from the defense to the state. I think probably two weeks from now would be fine. As I indicated, I intend to get the witness list to Mr. McCabe by the end of this week.

We have not received, to my knowledge at least, any discovery from the defense and obviously, unless counsel is going to argue that the state's reciprocal discovery laws do not apply, the state is also entitled and also expects, frankly without having to file a motion to compel, that we would be provided the statements of any witnesses and the reports of any experts who the defense intends to call.

I've always had the belief that it was assumed that both parties would comply with discovery and it was only on refusal to comply with discovery that a motion to compel is appropriate. Maybe I've muddied those two issues, but the length of the trial and the discovery, I think, are somewhat related to each other.

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THE COURT: Okay. Mr. McCabe.

MR. MCCABE: Thank you. I'm not sure how many issues Mr. Marquis touched on. I want to be real clear on how we view this case.

Mr. Guzek is entitled to rebut every piece of evidence that the state puts in. If that means that it's rebutted with evidence

that either has been or traditionally would be found in a guilt trial, then that's the position we'll take. I don't want to mislead anyone. The state cannot have its cake and eat it too. I cannot say that guilt has been determined and then put on a guilt case. They just can't do that. We have the absolute right to rebut. Every fact that goes to the circumstances of the offense is admissible and if it's mitigation, it would be error not to allow that in.

I do not agree with Judge Mosgrove's decisions regarding whether or not certain evidence could be put on at the last trial, so I'm suggesting that Your Honor will have to review that issue. Perhaps it would be a wise idea to put a briefing schedule on that as well so we don't get caught short during trial.

The state is going to put on certain evidence and certain witnesses and then we are going to have to decide how to rebut that. Now that I have a better idea of what the state intends to do, I think Mr. Ash and I and our [Page 88] investigators can sit down and make those decisions. But without getting into too much detail, I think that this is an issue that there will be some argument about.

THE COURT: I think if the state presents evidence that something happened and somebody was seen driving into a driveway, at least in the guilt stage, and it was a blue car, I think defense is entitled to say, no, it was a red pickup or it didn't happen.

But at this point, I don't share the view that the question of guilt is an issue, it is not an issue. So I understand what you're saying, you may want to nit-pick or talk about or contradict assertions. Just because it comes in from a live witness, doesn't mean it can't be disputed either on cross-examination or in the defense's case and I think you're making that clear.

I think the court is entitled to ask of counsel as this thing moves along for its opinion with respect to the duration of the trial. I don't see any reason for a six month trial. I'm kind of looking at eight weeks, but I don't know where I'm getting that, but that's what I'm looking at and I'd be surprised if it goes appreciably longer. I mean I would think it might be a little bit less than that or a little bit longer than that.

* * * * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Case No. 87CR0373TM

Plaintiff,

v.

RANDY LEE GUZEK,

Defendant.

TRANSCRIPT OF PROCEEDINGS
Hearing Motions

Day of: September 8th, 1997
10:00 a.m.

BEFORE: THE HONORABLE PIERRE L. VAN RYSSELBERGHE
APPEARANCES:

For the Plaintiff: MR. JOSH MARQUIS
District Attorney
Bend, Oregon

For the Defendant: MR. DUANE MCCABE
Attorney at Law
MR. JONATHAN ASH
Attorney at Law
Bend, Oregon

Reporter: P. Clark

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[THE COURT:]

Now I'm going to review this list with you. It seems to me the only one remaining which is a recent motion is that pertained alibi?

MR. MARQUIS: And there is also the new, the brand new filing for motion for proportionality reviewed by the trial court that was filed, I got it on August 29th. It looked almost identical to the one that was reviewed and denied by the court, but I think in that case Mr. Ash was asking for a motion for proportionality review by the jury and now they are asking for the court to do a trial. I'm not sure.

In any event, it would involve considerable amount of testimony and I want, since as I understand it, our last day before the 23rd of September, to resolve it.

THE COURT: I understand. Could we take the alibi first and then maybe the proportionality?

MR. MCCABE: Certainly, Your Honor.

THE COURT: Okay. I'll hear you on that.

MR. MCCABE: It's just a notice, Your Honor.

MR. MARQUIS: Your Honor, defense is not entitled to the notice of alibi because alibi goes to presenting evidence to attempt to convince the jury that the defendant didn't do this. That issue, as the court has pointed out, has been affirmed by the court. This just will be told, as may other juries where they are being [Page 159 resentenced, whether they are facing death or true life or life with possibility of parole where the guilt of the defendant is not for them to determine, it's been established.

I vividly recall standing in this courtroom and having this conversation and I believe that my recollection was the court

said that would not preclude defense counsel from examining witnesses as to their recollections. And if a witness said, no, I saw Mr. Guzek driving a red car and, in fact it was a blue car, counsel would be entitled to do that and would be entitled to argue to the jury that the person's perceptions weren't accurate. I think that was the example the court used.

But to file notice of alibi, this very issue came up before Judge Mosgrove last time with other counsel and Judge Mosgrove -- again and it's not binding on this court -- made it absolutely clear that the defense was not entitled to relitigate guilt. That has been determined. The only purpose of notice of alibi is to say Randy Guzek wasn't there, he was someplace else.

Again, I'm quite concerned about the filing of this notice because what it does is it says the state is going to be required to relitigate guilt. And although counsel has said that the state is going to put on all this evidence, there is a considerable difference between retrying a penalty [Page 160] phase case and actually retrying the guilt phase. We wouldn't be talking about seven or eight days, which is what I've estimated for the state's case, we'd be talking about a considerable amount longer than that.

And the reason that I'm concerned about this is that there has been no mention of this since the court made it's, I think appropriate ruling on May the 20th or the 21st, 23rd, whatever day we were in court, and now all of a sudden it's oh, by the way, we're going to bring up alibi.

Counsel says it's simply a notice of it. I'd like the -- I think the issue, unfortunately, is right before the court as to whether or not the defendant is going to be allowed to put on evidence that attempts to prove that he was not guilty of these offenses.

THE COURT: Any further comment?

MR. MCCABE: Your Honor, I made it very clear that alibi is being offered as mitigation. It goes to the circumstances of the crime. It's mitigating evidence that someone is not there. A defendant is entitled to put on that evidence as mitigation because if the state is going to put on all the evidence it wishes to as it relates to the guilt, then, mitigating evidence should be admissible just as well.

I don't see where you can draw the line because if you allow the state to put in all this evidence of guilt, [Page 161] deny the defendant the right to put on his mitigating evidence -- Circumstances of the offense is part of the fourth question. If you're not there, that is certainly mitigating.

THE COURT: Well, this is not a motion in liminie, it's a notice, it's a question of relevancy, and I would expect to hear an appropriate objection and the court is going to make a ruling.

It seems to me it's a question of why is a piece of information offered by sworn testimony or by exhibit, what inference attaches. And if the inference bears upon a issue that pertains to a question of penalty and not guilt, you can anticipate the court is going to rule it inadmissible.

On the other hand, if the inference is a proper one, whatever the piece of evidence is on the issue of penalty, it may considered.

MR. MARQUIS: I understand, Your Honor. I am concerned, however, that Mr. McCabe is going to stand up in an opening statement to this jury and tell them that the defense is going to present evidence that Mr. Guzek didn't do it. When that bell has been rung, there is no way to unring it.

THE COURT: I understand. It's not a motion in liminie. That's been noted.

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MR. MARQUIS: Well, then I'll tell the court right now I will file a motion in liminie to prevent the defense from doing that until and unless the court has had an opportunity out of the presence of the jury to allow that.

I believe otherwise, defense counsel is going to tell the jury in opening statement that Mr. Guzek didn't do it and that the state won't be able to prove that.

THE COURT: See, the jury is going to be told early on that this is not a question of guilt or innocence. The jury is going to be told that he has been found guilty and this is the penalty phase. That's what the jury is going to be told.

I don't intend for evidence to be offered that's inconsistent with that representation to the jury. It's a question of what the evidence is, what the inference is, the intended inference and whether it's relevant.

Mr. McCabe has provided a notice and I think Mr. Marquis is going to file a motion in response and whether that deals with it, we'll see.

But I would say this, even parenthetically now, and I've said it once and I don't want to belabor it, but I would expect that counsel would not present the jury with representations that are inconsistent with either the introduction of the case, which you have before you, and what the instructions are likely to be.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Case No. 87-CR-0373-TM

Plaintiff,

v.

RANDY LEE GUZEK,

Defendant.

JURY TRIAL

OCTOBER 24, 1997

VOLUME VIII

BEFORE: THE HONORABLE PIERRE L. VAN RYSSELBERGHE Circuit Court Judge of Deschutes County, *pro tem*

APPEARANCES:

For the State: Joshua Marquis
Deschutes County DA's Office
1164 NW Bond Street
Bend, Oregon 97701

For the Defendant: Mr. Duane McCabe
Jonathan Ash
Attorneys at Law
44 NW Irving
Bend, Oregon 97701

COURT REPORTER: C. Rudishauser

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MR. MARQUIS: Your Honor, I need to make this witness mine at this time, and I'll ask different questions.

THE COURT: Very well.

DIRECT EXAMINATION [OF N. MEFFORD]

BY MR. MARQUIS:

Q. Can you give the jury any examples of how you believe you were manipulated by Randy Guzek?

MR. MCCABE: Objection, Your Honor, calls for a conclusion and opinion.

THE COURT: It's overruled.

Q. Go ahead.

A. I've had letter within the last eight years --

MR. MCCABE: Your Honor, I'd like to be heard at this time outside the presence of the jury.

THE COURT: Okay. I'll excuse the jury.

(Jury exits)

THE COURT: Mr. McCabe?

MR. MCCABE: Thank you, Your Honor. Your Honor, it is our position that even the issue of manipulation is not relevant to this proceeding. Nowhere in the statutes does it state that manipulation is an aggravating factor. Counsel has gone on and on about this issue of manipulation. Because it is not relevant to any of the questions that need to be answered, I would ask that it be excluded on that basis. Secondly, now he's trying to get into specific acts of manipulation, which our position would be, since it's [Page 23] his witness, and it goes to character trait, he's not entitled to get into specific acts. And I think counsel's raised that issue as, as a shield to keep

our cross-examination regarding some of his witnesses. If the court deems that manipulation is a relevant character trait, then all that counsel can elicit is her opinion, same manner in which you could as it related to truthfulness or peacefulness. But you cannot get into specifics. The issues that counsel wants to get into deal with communication between this witness and my client. I suspect it will try to get into issues of his denial of responsibility, which the court has ruled long ago is not at issue here. And we have been precluded from putting on any evidence of innocence by the court's early rulings, and we have abided by that. If counsel opens up this door by arguing that specific statements of denial of responsibility somehow go to these issues, then we should be entitled to open up the entire case. Because if we're not able to do so, then Randy Guzek will be horribly prejudiced in this situation. It's a violation of his rights under the Oregon Constitution Article One, Section Ten, Eleven, Twelve, Fifteen, Sixteen, Twenty, Twenty-One and Thirty-Three. It's a violation of his rights under the United State Constitution, Amendments Five, Six, Eight, Fourteen, and in particular, the due process clause. What happens is, the State is able to put on evidence of deniability, of lack of responsibility. Defendant is precluded from putting on any evidence such as alibi evidence that counsel has tried to over and over again make certain there is no mention of even, let alone the evidence. It creates for [Page 24] an unreliable sentencing hearing. It is in violation of *Oregon v. Wardius*, in that there is no reciprocity. So the State is able to take potshots and we are not able to rebut. And it is on all those bases that I ask the court to limit, if there's any relevance at all, this witness's testimony as to her opinion, but not specific acts.

MR. MARQUIS: Well, Your Honor, counsel is making some interesting sort of legal flailings, but this trial is about Mr. Guzek, and it's about all of the acts that he commits. And

it's not, we're not limited to simple opinions about whether somebody's truthful or whether somebody's manipulative. There's already been expert testimony laid for a foundation as to the characteristics of a sociopath. And the issue of, I think the court has made clear that the absence of stating remorse is one thing, that that cannot be commented on. But certainly, statements that the defendant chooses to make to anybody are admissible, and certainly in the context of what this witness is testifying to. And I honestly don't know, I mean, we can proceed with an offer of proof, because I'm not sure exactly what this witness is going to say. But in any event, I believe we're entitled to get this testimony out, and whether or not Mr. Guzek has manipulated people and manipulated witnesses and manipulated this young woman in particular, is incredibly probative, and she'd not only testified that she has knowledge, but that she was involved with him at about the time of the murders.

THE COURT: Well, it's my view that certainly there has been evidence of manipulation, I think manipulation is a relevant [Page 25] consideration for the jury. Further, character is a relevant consideration, and it may well bear on the third question, but it certainly bears on the second question. So the objection's overruled. Ready to go?

MR. MARQUIS: Does counsel wish to do this out of the presence of the jury, see what the answers are going to be?

MR. MCCABE: Yes, please.

THE COURT: Okay. Go ahead.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

STATE OF OREGON,

Plaintiff,

v.

RANDY LEE GUZEK,

Defendant.

Case No. 87-CR-0373-TM

NOTICE OF INTENT TO RELY ON EVIDENCE OF ALIBI AS MITIGATING EVIDENCE

Lawyers for Randy Guzek hereby give notice of intent to rely on evidence commonly called alibi evidence as relevant mitigating evidence. The following is provided pursuant to the mandate of ORS 135.455:

1. The prior court testimony of Clarence Guzek, since deceased, will be offered to prove that on June 28, 1987 from approximately 9:00 pm until June 29, 1987 at approximately 2:00 am Randy Guzek was in the presence of and at the home of Clarence Guzek on Walnut Street in Redmond, Oregon.

2. The testimony of Kathleen Guzek will be offered to prove that on June 29, 1987 she noted that at 2:16 am defendant asked her to set the alarm clock as he had to get up early for work the next day. The location of this conversation was at her residence on Walnut Street in Redmond, Oregon. She will further testify that when the alarm woke her at 4:20 am on June 29, 1987 she woke the defendant who was sleeping on a love seat on the deck of her house.

DATED this 20th day of August, 1997

/s/ Duane J. McCabe
Duane J. McCabe, OSB#74214
Lawyer for Randy Guzek

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Plaintiff, v. RANDY LEE GUZEK, Defendant.	Case No. 87-CR-0373-TM MEMORANDUM IN SUPPORT OF ADMISSIBILITY OF MITIGATING EVIDENCE

DEFENDANT IS ENTITLED TO INTRODUCE ALL MITIGATING EVIDENCE

1. Statutory Basis.

ORS 163.150(1)(b)(D)and(1)(c) (1989) which defendant asserts is the proper statute to apply to his case, or ORS 163.150(1)(c)(A)(B) (1997) which the court has ruled governs this matter, provides that all relevant mitigating evidence shall be presented to the jury for its consideration. Both versions of the statute provide that the jury shall consider in deciding whether defendant shall receive a sentence of death evidence of defendant history, background and the circumstances of the offense. The Oregon Supreme Court has held that "all aspects of a defendant's character and background are "relevant to sentence," should defendant receive a death sentence?" *State v. Wagner*, 309 Or 5, 19, 786 P2d 93 (1990).

2. Oregon Constitutional Basis.

a. State v. Wagner.

It is submitted that as a matter of Oregon Constitutional law, under Article I, sections 10, 11, 12, 15, 16, 20, 21, 33 and 40 in a death penalty sentencing hearing the jury, which must

make all sentencing decisions, see *State v. Smith*, 319 Or 37, 872 P2d 966 (1994) must consider any aspect of the defendant's character and record or any circumstance of the offense as an independent mitigating factor which makes defendant less deserving of death.

b. Article I, section 11 right to present a defense

Article I, section 11 of the Oregon Constitution protects both the defendant's right to the attendance of witnesses and the right to have the testimony of the witness. The fundamental right that Article I, section 11 protects is "the right to present a defense, the right to present the defendant's version of the facts." *State v. Lajoie*, 316 Or 63, 90-91, 849 P2d 479 (1993). Article I, section 11 is to be construed in the same manner as the federal counterpart construed in *Washington v. Texas*, 388 US 14, 87 S Ct 1920, 18 L Ed2d 1019 (1967). *State v. Lajoie, supra*, at 90. The case of *Chambers v. Mississippi*, 415 US 284, 302, 93 S Ct 1038, 35 L Ed2d 297 (1973) is a case cited in *State v. Lajoie*, which gives definition to what the "right to present a defense" means. The *Chambers* court invalidated a state's hearsay rule because it prevented a defendant from presenting witnesses in his own defense. The court held that a defendant's Fourteenth Amendment due process rights to a fair trial were denied in the mechanistically application of the state's evidence rule.

3. Federal Constitutional Basis.

a. Eighth Amendment Basis.

A defendant has a constitutional right under the Eighth and Fourteenth Amendments to the United States Constitution to present all relevant evidence which mitigates in favor of a sentence less than death. *Payne v. Tennessee*, 501 US 808, 822, 111 S Ct 2597, 2602, 115 L Ed2d 720 (1991); *Eddings v. Oklahoma*, 455 US 104, 114, 102 S Ct 869, 877, 71 L Ed2d 1 (1982); *State v. Wright*, 323 Or 8, ___ P2d ___, (1996).

States may not limit the introduction of evidence in mitigation of sentence at a capital sentencing hearing by way of the express wording of a statue. *Lockett v. Ohio*, 438 US 586, 57 L Ed2d 973, 98 S Ct 2954 (1978). States may not limit the introduction of mitigating evidence by a restricted interpretation of the statue which fails to channel the sentencing authority to give consideration to mitigating evidence. *Penry v. Lynaugh*, 494 US 302, 109 S Ct 2934, 106 L Ed2d 930 (1989). States may not limit the introduction of evidence in mitigation of sentence at a capital sentencing hearing by way of the express wording of a statue. *Green v. Georgia*, 442 US 95 (1979). States may not limit introduction of or effect of mitigating evidence by instructions to the jury. *Hitchcock v. Dugger*, 481 US 393, 107 S Ct 1821, 95 L Ed2d 347 (1987). States may not limit from considering all relevant mitigating evidence by jury verdict form. *Mills v. Maryland*, 486 US 367, 108 S Ct 1860, 100 L Ed2d 384 (1988); or by requiring by statue that a jury be unanimous in finding mitigating circumstances. *McKoy v. North Carolina*, 494 US 433, 110 S Ct 1227, 108 L Ed2d 369 (1990).

b. Fourteenth Amendment--Due Process Basis.

State rules of evidence may not be applied in a manner which prevents the sentencing authority from considering otherwise relevant evidence critical to the issue of punishment in a capital sentencing trial. *Green v. Georgia*, 442 US 95, 60 L Ed2d 738, 99 S Ct 2150 (1979). In *Green* the Court held that the Georgia evidence rule against the admission of a hearsay statement of a co-defendant must give way to the defendant's right to a fair trial under the Fourteenth Amendment to the United States Constitution when the evidence is highly relevant and substantial reasons exist to assume its reliability.

Also applicable to this constitutional principle is the case of *Chambers v. Mississippi*, *410 US* 284, 302, discussed

above. It is important to note that in addition to the application of the Fourteenth Amendment Due Process clause, this fundamental right to present a defense in compasses the Sixth Amendment rights to confrontation and compulsory process. *State v. Lajoie, supra,* at 91 n.12.

Recent cases from the 9th Circuit Court of Appeals firmly establishes that in a death penalty sentencing hearing the mechanical application of state evidentiary rules must give way the more important aspect of a defendant's Due Process right to a fair trial under the Fourteenth Amendment and the Sixth and Eighth Amendments right to present all relevant mitigating evidence. In *Rupe v. Wood*, 93 F3d 1434 (9th Cir 1996), the court held that the trial court erred in excluding evidence of the results of a polygraph test on the state's chief witness, Rupe's accomplice, offered in mitigation, where that evidence supported Rupe's theory that the witness played a greater role then he admitted and where it was not so unreliable that it totally lacked probative value. The *Rupe* holding is based upon the cases cited above, as well as the specific holding of *Mak v. Blodgett*, 970 F2d 614 (9th Cir 1992), *cert. denied*, 507 US 951, 113 S Ct 1363 (1993) that a trial court can exclude evidence in a penalty phase hearing if it is irrelevant, but a trial court cannot preclude any relevant mitigating evidence. 970 F2d at 623, citing *Skipper v. South Carolina*, 476 US 1,4.

EVIDENCE IS CONSTITUTIONALLY REQUIRED

The prosecutor will, as he did last time, stress to the jury the probable future dangerousness of defendant as the primary reason to sentence defendant to death. *Simmons v. South Carolina,* 512 US 154, 159, 112 S Ct 1723, 114 L Ed2d 309 (1994) gives to defendant a Fourteenth Amendment due process right to adequately rebut and put on evidence of the sentence a defendant will actually serve.

DATED this 21st day of October, 1997.

/s/ Duane J. McCabe
Duane J. McCabe, OSB#74214
Lawyer for Randy Guzek

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Case No. 87-CR-0373-TM

Plaintiff,

v.

RANDY LEE GUZEK, JUDGMENT

Defendant.

Date of Appearance: November 10, 1997

The Honorable Pierre L. Van Rysselberghe	
Joshua K. Marquis	Special Prosecutor
F.J. Maloney	Deputy Special Prosecutor
Duane McCabe	Defense Attorney
Jon Ash	Defense Attorneys
C. Rudishauser	Recorder

OFFENSES

AGGRAVATED MURDER (Count I)

AGGRAVATED MURDER (Count II)

On November 5, 1997, the jury impaneled in the above entitled cause having answered each of the questions as to the death penalty unanimously and in the affirmative,

The Court hereby orders that, as to the Aggravated Murder of Rod Houser (Count I), Defendant is sentenced to death by lethal injection.

The Court hereby orders that, as to the Aggravated Murder of Lois Houser (Count II), Defendant is sentenced to death by lethal injection.

Defendant's right of appeal was given.

Defendant is remanded to the custody of the Sheriff for delivery within 20 days from the time of judgment to the Superintendent of the Oregon State Penitentiary pending the determination of the automatic and direct review by the Supreme Court.

Dated this 10th day of November, 1997.

/s/ Pierre L. Van Rysselberghe
PIERRE L. VAN RYSSELBERGHE
CIRCUIT COURT JUDGE

[From Appellant's Opening Brief Filed in the Oregon Supreme Court 10/2000]

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ASSIGNMENT OF ERROR NO. 16

The trial court erred in denying Appellant's motion to exclude testimony by transcript, in denying Appellant's motion to strike the transcript testimony of Mark Wilson and Donald Ross Cathey, and in allowing such testimony to be read by surrogates to the jury.

ASSIGNMENT OF ERROR NO. 17

The trial court erred in allowing evidence of the plea agreements of Mark Wilson and Donald Ross Cathey before the jury.

ASSIGNMENT OF ERROR NO. 18

The trial court erred in excluding testimony and evidence impeaching the transcript testimony of Mark Wilson and Donald Ross Cathey.

ASSIGNMENT OF ERROR NO. 19

The trial court erred in excluding any defense evidence of alibi or other evidence tending to negate guilt, in answer to and in impeachment of the transcript testimony of Mark Wilson and Donald Ross Cathey.

Pertinent Portions of Record

Appellant incorporates, for purposes of these assignments of error the relevant portions of the record in support of his Assignments of Error Nos. 10, 11, 13, 14, and 15. Appellant further relies upon the following pertinent portions of record.

On May 20, 1997, Appellant filed a *Motion to Exclude Testimony by Transcript*, together with a supporting legal memorandum, seeking to exclude the testimony by transcript

of co-defendants Mark Wilson and Donald Ross Cathey, asserting a lack of statutory authority for such testimony, that such testimony would deny Appellant his federal and state confrontation rights, and that such procedure would violate the Due Process Clause. [Case Register: Event No. 590; App. I:1-14]. This motion was denied by order dated September 11, 1997. [App. I:33].

On October 9, 1997, Appellant moved the court for an order striking the previous testimony of Donald Ross Cathey and Mark Wilson, together with a memorandum in support and copies of the plea agreements of Wilson and Cathey. [App. I:15-32]. The motion was denied by an order dated October 9, 1997. [Case Register: Event Nos. 738; 749; App I:33].

At trial, Appellant offered, as offers of proof, denied by the court, the following statements in evidence for purposes of impeaching the surrogate transcript prior testimony of Mark Wilson and Donald Ross Cathey:

A. **Affidavit of Deborah L. Tuthill**, recounting an interview of co- defendant Cathey by her at Oregon State Penitentiary on June 19, 1991. Ms. Tuthill averred that during that interview, Mr. Cathey told her that he does not know specifically who planned the Leora Waite burglary; that it may have been his idea originally, but that he genuinely did not recall. Ms. Tuthill further averred that Mr. Cathey was sure that he had no intention of killing Ms. Waite; rather his intention was to knock her out. Mr. Cathey also said, according to Ms. Tuthill's affidavit, that after it was deemed unrealistic to continue with the Waite burglary, it was mutually agreed that the group (Messrs. Guzek, Wilson and Cathey) would go to Houser house. Mr. Cathey reportedly told Ms. Tuthill that there was no ring leader or any one person in charge; rather the activity was mutual. Ms. Tuthill's affidavit further recited that Mr.

Cathey told her that there had been no plan or prearrangement to kill the Housers and that their intention was to rob the house. Mr. Cathey reportedly told Ms. Tuthill that Randy Guzek at no time told Mark Wilson to "Do it!", but rather the shooting "just started." Mr. Cathey added, according to Ms. Tuthill, that from his vantage point, he could see Mrs. Houser at the top of the stairway seconds before the shooting began. " [Case Register, Event Nos. 838, 839].

B. **Memorandum of Defense Investigator David Rogers**, dated August 20, 1997, recounting several conversations he had with Mark Wilson at the Oregon State Penitentiary. According to Mr. Rogers' memorandum, Mr. Wilson told him the following: Wilson and the Appellant began committing burglaries while they were still in high school. They began using methamphetamine, and that usage escalated. Wilson was a good student who began dozing off in class due to methamphetamine use. Wilson had been a cadet at the police department. He eventually experienced a deterioration of his body. Wilson and Appellant's first burglary was of a residence in which they had previously attended a party. While there, they observed coins. They returned later and stole the coins. Joel Guzek, Appellant' father, assisted them with that burglary. Mark and Randy committed many burglaries. Neither of them was the leader, there was no leader. Proceeds of the burglaries went to Appellant's father. Appellant and Wilson began carrying guns, but Wilson did not know why they did so. Regarding the Housers, there was not any plan to kill them, and Wilson cannot recall if Appellant really said "Do it!" regarding the shooting of Rod Houser at his front door. [*Id.*]

C. **Deposition of Mark James Wilson**. On April 16, 1993, in the Marion County Circuit Court Case Mark James Wilson, Petitioner v. Manfred Maass, Superintendent, Oregon State Penitentiary, Defendant; No. 91-C10468. In the deposition, Wilson made numerous comments concerning the Houser homicides. Among the statements, were assertions that Wilson did not recall shooting anybody twenty times. He remembered pulling the trigger once outside the house and once inside the house. He did not remember what his state of mind was at the time of the homicides. He was really bothered because he lacked any idea of what was going through his mind at the time of the homicides. He did not specifically know that the gun (used to shoot Rod Houser) was loaded. He had a gun every time they (presumably meaning Wilson and Appellant) committed burglaries. Wilson did not think he ever thought about using the guns during the burglaries. He does not know what his frame of mind was as far as the murder [sic] committed that night. He believed he was mislead by his trial attorneys, and that if he had known the Parole Board would deny him parole forever, rather than his being definitely released at age 58, he may not have entered into the plea bargain and instead have gone to trial or accepted a death sentence. [Deposition of Wilson, at 8-10, 40-42; Case Register: Event Nos. 838, 839].

D. **The live testimony of Rachel Prudence Elaine Carlson**. Ms. Carlson was an inmate at the Oregon Women's Correctional Center (OWCC). While there, she met Mark Wilson. Ms. Carlson was a legal assistant at OWCC at the same time Wilson was a legal assistant at Oregon State Penitentiary (OSP) which is located directly behind OWCC. They met through daily phone calls and

letters. Ms. Carlson did not know Wilson prior to her incarceration.

Eventually, Carlson and Wilson's legal/business relationship evolved into a "social" relationship. They began writing as "pen pals," writing back and forth to each other on a personal level. The telephone calls became more "friendly."

Shortly after Memorial Day, 1997, during one of their telephone calls, Ms. Carlson discussed with Wilson what she had heard about the instant cause, whereupon Wilson characterized her statements as "vicious rumors." Wilson then wrote her a letter about the crimes.

In their first phone call discussing the crime, Wilson became very angry, swearing a lot. He was unhappy with Carlson for listening to anyone about the case. Wilson's follow-up letter was more detailed as far as information about the crime.

Wilson said it was a "burglary that had gone bad." Wilson wrote to Carlson that he had not killed two people, but only one; he gave a brief history of his methamphetamine use starting in January, 1987, through February when he got suspended from school for "doing lines" in the back of his English class, through April when he said he "packed some kind of gun." He further related that graduation was on June 5, and on June 28, he and Appellant had spent the weekend getting high and "using crank," had gotten bored, and decided to do a burglary. He went onto state that he had killed a man during the burglary. Wilson wrote that the people ended up being home, the burglars panicked and two people were killed. Prison officials were disturbed by the letter to Ms. Carlson and interviewed her about it. The letter itself was offered as Defense Exhibit No. 347.

(10/27/97, Tr. 60-67).

E. **Testimony of Lynn Fredrickson**, Lead Detective investigating the Houser homicides. The Fredrickson offer of proof concerned defense exhibit 348, a report by Fredrickson prepared November 6, 1987, with an appended school record.

(10/27/97, Tr. 81-82).

F. **Testimony of Defense Investigator David Rogers**. Mr. Rogers had reviewed defense exhibit number 347, ante, specifically a reference in that letter from Wilson to Carlson, regarding a meeting between Wilson and prior defense counsel for Appellant. Rogers testified that he was present at the meeting, in which Wilson indicated that he was inclined to testify on behalf of Appellant.

(10/27/97; Tr. 82-84).

G. **A representation by Appellant's trial counsel** that in a conversation with Wilson's lawyer concerning whether or not Wilson would testify in this trial, that Wilson's counsel advised Appellant's counsel that Wilson did want to assist in any he could, but was going to rely on the advice of his attorney. Secondly, that any conversation between Prosecutor Marquis and Wilson's counsel, discussions were had causing Wilson's counsel to conclude that Prosecutor Marquis was saying that if Wilson testified, and did so differently that he did in the first trial of this cause, that would be grounds to vitiate the (life saving to Mr. Wilson) plea agreement.

(10/27/97; Tr. 84-85).

H. **Testimony of Stephanie Dawn Wilson**, wife of Mark Wilson for four years. Mrs. Wilson met Mark Wilson twice before the crimes were committed, in the company of Appellant. She started correspondence with Wilson in

January, 1993. Wilson had discussed the circumstances surrounding his aggravated murder conviction with her several times. Wilson told her that he, Appellant and Cathey had been out committing burglaries and, at one point, ended up at the Housers, where they had gone to commit a burglary, expecting no one to be home, but resulting in the murders. He never told her of any intent among the three of them to kill anyone when they went to the Houser resident. Wilson told his wife that the three of them did not discuss killing the Housers specifically, or any one else specifically. He had been consistent in this story. Wilson also told his wife that he had declined to testify in Appellant's current proceeding, invoking his Fifth Amendment privilege under the advise of his attorney, "because he was not certain that they would not revoke his plea agreement and seek the death penalty against him in a future proceeding."

(10/27/97; Tr. 99-101).

On August 20, 1997, Appellant filed a *Notice of Intent to Rely on Evidence of Alibi as Mitigating Evidence* (Case Register: Event No. 645). The notice recited specific evidence Appellant wished to offer, which Appellant asks this Court to consider as constituting an offer of proof:

I. **The prior court testimony of Clarence Guzek** (Appellant's grandfather), since deceased, offered to prove that on June 28, 1987, from approximately 9:00 p.m. until June 29, 1987, at approximately 2:00 a.m. Appellant was in the presence of and at the home of Clarence Guzek on Walnut Street in Redmond, Oregon.

J. **The testimony of Kathleen Guzek** (Appellant's mother), offer to prove that on June 29, 1987, she noted that at 2:16 a.m. Appellant asked her to set the alarm clock as he had to get up early for work the next day. The

location of this conversation was at Kathleen Guzek's residence on Walnut Street, in Redmond, Oregon. She further would testify that when the alarm awoke her at 4:20 a.m. on June 29, 1987, she woke the Appellant, who was sleeping on a loveseat on the deck of her house.

In support of the foregoing offers of proof, in addition to other grounds, Appellant relied upon his *Memorandum in Support of Admissibility of Mitigating Evidence*, referenced numerous times in the Case Register and recited passim; See, for example, 10/27/97 Tr. 104)(App. H:9-14; Case Register: Event Nos. 833, 892, 873, 884).[1]

The state introduced the plea petitions of Wilson and Cathey as evidence for the jury's consideration. (10/27/97, Tr. 13; State's Exhibits 140, 169, 10/8/97 Tr. 16; App I:21-32). Page 4, subsection (5) of Wilson's plea agreement stated: "In

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[1] MR. McCABE: Just so the record is clear, I would assert the same grounds in my memorandum. I'm assuming the court is considering the grounds that I've raised -

THE COURT: You bet, I've got it right in front of me in three copies.

MR. McCABE: And it's probably not necessary to put another copy into the record, I would assume?

THE COURT: I wouldn't think so. I think the record, I'm not an appellate court, I don't know what they'll think of this record, but I think, at least for my purposes, its sufficient.

MR. McCABE: Okay, so I have, and I do rely on all those cases cited in my memorandum in support of admissibility of mitigating evidence.

THE COURT: So noted. * * *

THE COURT: Okay, that concludes this offer of proof.

addition, I will be subponaed to testify at any trial of both persons mentioned above, Mr. Guzek being one of them." Subsection (6) stated "If I do not testify truthfully in any trial referred to in (5) above, the State of Oregon and Judge Edmonds will no longer be bound by their previous promises made." (*Id.*; 10/27/97 Tr. 28).

The trial court found that Wilson and Cathey were unavailable to testify, and allowed their testimony to be presented through surrogates, denying Appellant's motion to exclude such testimony by transcript, and to strike same. (10/7/97 Tr. 29).

The trial court ruled inadmissible all of Appellant's offers of proof recited above. (10/27/97, Tr. 14, 78, 79, 80, 82, 85, 103).

The bulk of co-defendants' testimony was summarized in Appellant's brief filed in October, 1989, in his original direct review proceeding. It was also summarized in Assignment of Error No. 10 of his opening brief in *Guzek II*. The version of the homicidal events offered by Wilson and Cathey may be briefly summarized as follows:

> Mark Wilson met Appellant at Redmond High School in November, 1986, and they became good friends. Wilson was a frequent house guest at the Guzek residence on Jackson Street in Redmond and kept a toothbrush and razor there. Appellant and Wilson both worked at Pozzi Windows and frequently rode together. Defendant and Wilson met Donald Ross Cathey on June 5, 1987, through another friend, Willie Stevens. Cathey came to the area from California to visit Stevens around the first part of June, 1987. Appellant, Wilson and Cathey were acquaintances and sometimes did things together.
>
> Wilson related that Appellant's father, Joel Guzek, and his girlfriend, Jill Armstrong, had a plan to steal jewelry from

an elderly lady by the name of Mrs. Whaite as one of the last illegal things they did before leaving town. Joel estimated that Mrs. Whaite had approximately $10,000 worth of diamond rings. Wilson got Mrs. Waite address by impersonating an Eagle Crest timeshare salesman and asking to send her some literature. Appellant and Wilson drove to the area and attempted to find the house. Wilson consulted an encyclopedia and called several chemical companies to find out about chemicals that would knock a person out.

Appellant, Wilson and Cathey spent June 28, 1987, together swimming and riding Wilson's quadrunner at "The Cove" and Climb Falls. Robin Martin saw the three at Climb Falls and estimated that they left between five and six p.m. Appellant left before Wilson and Cathey did to go see a girlfriend. Wilson and Cathey drove to Crooked River Ranch, then drove down Lower Bridge Road following two attractive young ladies in a Mini Blazer with jet skis. On the way, Cathey saw a house on a hill and said "this looks like a nice house to hit", meaning burglarize. Wilson explained that it was Anne Houser's aunt and uncle's house. Wilson dropped Cathey off in Redmond and returned to his home in Crooked River Ranch.

Wilson returned to Appellant's resident on Jackson Street later that same evening. Appellant decided to get Mrs. Waite's rings for his father. Appellant discussed the plan to burglarize the Waite residence with Cathey and Cathey was "all for it." Wilson and Cathey drove to Crooked River Ranch to steal a headlight switch for Wilson's truck, but a security patrol passed by and Wilson instead went home and borrowed his mother's truck. Donna Wilson saw her son Mark and Cathey as they returned the quad

runner and left in her truck about 11:45 p.m. Wilson and Cathey returned to Appellant's residence in Redmond.

After heading out, the three stopped at the Safeway parking lot in Redmond and each snorted one line of crank. They then proceeded toward Bend to carry out the Whaite plan. Cathey and Wilson were to go up to the door and say they were having car trouble and Cathey was to stab Mrs. Whaite with a pocket knife Appellant had given him. Appellant was to act as look out and to help remove valuables after everything was clear. The entire plan was scrapped because there were too many lights on and too many cars in the Whaite's driveway that night. Cathey also said he backed out when they got to the house.

Mark Wilson described the next sequence of events as follows:

"Q [Prosecutor]: Then where did you go after you went past her residence?

A [Wilson]: Well, we headed back up the hill because she lived down next to the river, so we headed up the hill again and headed towards Redmond.

* * * * *

Q: Was there any discussion as to what you were then going to do?

A: At that time we all decided basically that we were, we would like to hit a house, burglarize a house. And we were trying to figure some place to burglarize.

Q: Did you eventually decide on a place to burglarize?

A: Yes, we did. That would have been the Houser residence.

Q: How did you arrive at the decision to, to go to the Houser residence?

A: I believe Ross Cathey brought up the fact as 'what about that house we saw today, Anne Houser's aunt and uncle's ' and, we all thought that would be okay with us to go. I guess that's what we decided on."

The trio returned to the Guzek residence on Jackson Street and Appellant procured a .22 rifle and .32 pistol from the house. They headed for the Houser residence and along the way Appellant stopped to show Wilson how to un-jam the rifle and fired several shots. Appellant and Wilson told Cathey that if anyone was home at the Houser residence they would go in and "get them down." All three went up to door upon arrival. Appellant knocked several times. Rod Houser answered the door in his robe and asked what they wanted. Appellant made up a story about prank phone calls from Anne Houser and Rod started getting irate. At that point, Appellant turned to Wilson and yelled "do it" and Wilson immediately raised the rifle and started firing. Wilson continued to fire at Rod Houser as Rod backed into his house and eventually fell down in front of the front room fireplace. Wilson did not recall how many shots were fired or even that he emptied the clip, but he appeared to fire until the rifle ran out of bullets.

As Wilson was shooting Rod Houser, Appellant ran up the stairs after Lois Houser and three shots were heard by Wilson and Cathey to come from upstairs. Cathey told Wilson "let's make it look like a cult killing." Cathey stabbed Rod Houser in the throat with a pocket knife Appellant had given him earlier that night. Cathey also put a white Bible on top of Rod Houser's body. Wilson and Cathey observed Appellant rummaging through property upstairs and were told by Appellant that he found a .357 magnum in a closet and that he assumed Lois was going for it when he "hit" her there. Appellant also said he placed a knife in Lois Houser's outstretched hand.

Appellant told Cathey and Wilson to listen for cars and to check downstairs for items of value to take. All three removed property from the residence and stacked it in Donna Wilson's pickup. All three wore gloves. The pickup was 1/2 to 3/4 full with Houser property. The trio left but returned shortly thereafter to retrieve empty shell casings left in the residence. They drove to Ferguson's Market in Terrebonne where Appellant called his father to come and meet them. Joel Guzek and Jill Armstrong arrived a short time later and most of the Houser property was loaded into their Volkswagen Jetta. Appellant told his father the property came from a drug deal gone bad and Wilson and Cathey went along with the story.

Wilson and Cathey each received some money from Appellant, but neither got any of the Houser property. Appellant told Wilson at work later that he (Appellant) had shot Lois Houser in three vital areas. Appellant and Wilson accompanied Joel Guzek and Jill Armstrong to Reno for the fourth of July weekend. Along the way Joel asked Appellant if they thought it was really worth it. Appellant got a big grin on his face and said "yes it was."

At one point after their arrests, Appellant and Cathey were housed in adjacent cells in Deschutes County Jail. Appellant passed a note to Cathey through a hold in the cell wall requesting Cathey to write a note saying that Appellant had nothing to do with the homicides. Cathey and Wilson both reached life-saving plea agreements with the prosecutor and agreed to testify against Appellant. Wilson and Cathey both testified that Appellant killed Lois Houser.

(10/8/97 Tr. 18-85; 10/14/97 Tr. 196-259; 10/15/97 Tr. 30-141).

Relevant Statutory and Constitutional Provisions

Former ORS 163.150(5)(d), now codifiifed as ORS 138.012(b), states, in relevant part:

> ". . . A transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceedings are admissible in the new sentencing proceeding. Either party may recall any witness who testified at the prior trial or sentencing proceeding and may present additional relevant evidence."

OEC 802 provides:

> "Hearsay is not admissible except as provided by Rules 801-806 (ORS 40.450 to ORS 40.475) or as provided by law."

OEC 803(a) provides:

> "(3) **Hearsay exceptions**. The following are not excluded by Rule 802 (ORS 40.455) if the declarant is unavailable as a witness:
>
> (a) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination."

OEC 804(1) [ORS 40.465(1)] defines "Unavailability as a witness" to include situations in which the declarant:

> "(a) Is exempted by ruling of the court on the ground of privilege from tesitfying concerning the subject matter of the statement;
>
> (b) Persists in refusing to testify concerning the subject matter of a statement despite an order of the court to do so;
>
> (c) Testifies to lack of memory of the subject matter of the statements;

(d) Is unable to be present or to testify at the hearing because of death or then existing mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of an exception under paragraph (b)(c) or (d) of subsection (3) of this section, the declarant's attendance or testimony) by process or other reasonable means."

OEC 806 provides:

"**Attaching and Supporting Credibility of Declarant.** When a hearsay statement, or a statement defined in ORS 40.450(4)(b)(C), (D) or (E) [Rule 801(4)(b)(C), (D), or (E)], has been admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the hearsay statement of the declarant, is not subject to any requirement under ORS 40.380 [Rule 613] relating to impeachment by evidence of inconsistent statements. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination."

The Legislative Conference Commentary to Rule 806, states in relative part:

"Oregon Rule of Evidence 806 prescribes the manner and limits of impeaching, rehabilitating and cross-examining a hearsay declarant. The rule is based on Rule 806 of the Federal Rules of Evidence. Its reference to ORE 613 replaces a federal reference to the opportunity to deny or

explain, and was made necessary by the specific retention of Oregon practice on inconsistent statements in that rule.

Impeachment of absent hearsay declarant. The declarant of a hearsay statement that is admitted into evidence is in effect a witness. Therefore, in fairness, the declarant's credibility should be subject to impeachment (and to rehabilitation) as if the declarant had in fact testified. See Rules 608 to 609-1. There are problems in doing this, however. These arise from the factual differences between hearsay and live witnesses, and between kinds of hearsay, and principly involve the foundational requirement for impeachment by inconsistent statement.

An inconsistent statement of a live witness is inevitably a prior statement, which may be called to the witness' attention in accordance with ORE 613 a statement that is inconsistent with hearsay may be subsequent to it, and cannot be called to the declarant's attention. If the court insists on the usual rules for impeachment by inconsistent statements in a hearsay situation, it must deny the opponent, who is already barred from cross-examination, any benefit of this important technique. The writers favor allowing the inconsistent statement. McCormick, Evidence section 37 at 74 (2nd Ed. 1972); 3 Wigmore, Evidence section 1033 (3d Ed. 1940). The cases, however, are divided. Compare People v. Collup, 27 Cal.2d 829, 167 P2d 714 (1946); People v. Rosoto, 58 Cal.2d 304, 23 Cal.Rptr. 779, 373 P2d 867 (1962); Carver v. United States, 164 US 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897) (allowing impeachment), with Mattox v. United States, 156 US 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); People v. Heinz, 284 NY 93, 29 NE 2d 483 (1940) (disallowing impeachment).

When the inconsistent statement was made after the hearsay statement, the kind of hearsay involved seems unimportant. The opponent may not have been totally deprived of cross-examination when the hearsay is former testimony, ORE 804(3)(a), but the opponent still was deprived of cross-examination along lines suggested by the trial.

* * * * *

For these reasons, the Legislative Assembly dispensed with the foundation requirement in all hearsay situations, leaving a rule which is readily administered and fair.

* * *

The above matters had not been addressed in Oregon statute or case law. Federal Ninth Circuit law is in accord, however. McConney v. United States, 421 F.2d 248, 251 (9th Cir. 1969); See also: Carver v. United States, *supra*."

Article I, Section 11 of the Oregon Constitution provides in relevant part:

"In all criminal prosecutions the accused shall have the right . . . to meet the witnesses face to face . . . "

The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . "

ARGUMENT

Standard of Review

This Court reviews the trial court's admission or exclusion of evidence for errors of law. *State v. Pinnell*, 311 Or 98, 109

n. 17 (1991). This Court reviews constitutional issues for errors of law.

Discussion

Because of the close interrelation of the questions presented, Appellant combines his arguments on Assignments of Error Nos. 16, 17, 18, and 19. In *Oregon Evidence*, pp. 521-522 (Butterworth Legal Publishers Second Edition), Laird C. Kirkpatrick discusses the relationship between hearsay and the Confrontation Clause:

> "The hearsay rule and the Confrontation Clause are not co-extensive. Evidence may be admissible under the confrontation clause, yet be inadmissible under the hearsay rule. Conversly, evidence may be admissible as an exception to the hearsay rule under state evidence law, yet be inadmissible under a confrontation clause. *See, Pointer v. Texas*, 380 US 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). . . . If the hearsay declarant does not testify at trial and the out-of-court statement is admitted as an hearsay exception, whether or not the Confrontation Clause depends on whether there is a satisfactory basis for the trier of fact to evaluate the truth of the prior statement and whether the statement possesses sufficient 'indicia of reliability.' *Dutton v. Evans*, 400 US 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).
>
> As the Supreme Court stated in *Ohio v. Roberts*, 448 US 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980):
>
> The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." . . . This reflects the truism that 'hearsay rules and the Confrontation Clause are generally designed to protect

similar values," *Califomia v. Green*, 399 US at 155,' stem from the same roots. *Dutton v. Evans*, 400 US 74, 86 (1970). It also responds to the need for certainty in the work a day world of conducting criminal trials.

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then though, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.'

As the quoted statement indicates, if the declarant is shown to be unavailable and the statement satisfies a 'firmly rooted' exception to the hearsay rule, compliance with the Confrontation Clause is almost certain to be found. If no showing is made of the unavailability of declarant . . . or if the hearsay exception is not 'firmly rooted' there is greater uncertainty regarding whether the Confrontation Clause is satisfied."

On Page 523, Kirkpatrick compares the state and federal confrontation provisions and states that:

"To date the Oregon Supreme Court has tended to adopt the precedents of the United States Supreme Court 'in determining what constitutes unavailability of a hearsay declarant and what constitutes adequate indicia of reliability of hearsay declarations to satisfy our state constitutional confrontation clause.' *State v. Campbell*, 299 Or 633, 648, 705 P2d 694, 703 (1985)."

The United States Supreme Court has recently ruled that statements of co- defendants, against their own penal interest, which inculpate the defendant on trial, may not be admitted

against the defendant on trial if that defendant has no opportunity to cross-examine; doing so would violate the federal Confrontation Clause, because statements against penal interest are not "firmly rooted" and are inherently suspect. *Lilly v. Virginia*, 527 US 116, 119 S.Ct. 1887, 144 LEd2d 117 (1999). *See also*: *Gray v. Maryland*, 523 US 185, 118 S.Ct. 1151, 140 LEd2d 294 (1998).

Nonetheless, Appellant urges this Court to re-examine the issue, both because Appellant believes that ORS 138.012(2)(b) on its face by permitting the state to substitute surrogate testimony by transcript, is unconstitutional; additionally, Appellant contends that doing so in this case Violated his state and federal constitutional rights.

ORS 138.012(2)(b) on its face, permits the state to substitute the surrogate testimony by transcript of the co-defendants from Appellant's first trial in lieu of live testimony, and the statute facially allowed this to occur in lieu of the state producing the witness in the courtroom to show unavailability, and without requiring the state to show that the Appellant "had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination." Here, both Wilson and Cathey were produced (Wilson by telephone). Cathey was adamant he would not testify under any circumstances. Wilson invoked his Fifth Amendment privilege against self-incrimination, because, as explained by his attorney, he had a federal habeas corpus proceeding pending. The trial judge, however, did not explicitly order Wilson and Cathey to testify.

It is Appellant's position that ORS 138.012(2)(b) as it was applied in this trial, is in conflict with the hearsay rules of the Oregon Evidence Code and violates the state and federal provisions concerning the use of former testimony as an exception to the hearsay rule, thereby also violating the state and federal Confrontation Clauses. No former testimony

should have been presented in Appellant's trial, notwithstanding the real or purported "unavailability" of the witnesses.

The hearsay exception to the admissibility of former testimony permits the admission of former testimony only in those situations where the parties at the prior proceeding had a "similar motive" to examine the witnesses as they would if the witness was produced life at the current proceeding. ORS 138.012(2)(b), violates the state and federal Confrontation Clauses unless it is rooted in a well-recognized hearsay exception. The state cannot demonstrate that any former testimony fell inside a firmly rooted exception to the hearsay rule, by virtue of *Lilly v. Virginia, supra*. The state, in order to do so, would have to demonstrate that the parties at Appellant's first trial had "similar motives" to examine the witnesses, as they would have at the trial in the present hearing.

ORS 163.150 provides the sentencing scheme in a death penalty case. Appellant was first tried in 1988. The testimony of the witnesses the state offered through a surrogate was transcribed in 1988. At the time of Appellant's 1988 trial, the jurors sitting in the sentencing hearing deciding whether or not death should be imposed on a person convicted of aggravated murder had to resolve only three issues: (1) Did the defendant deliberate; (2) Would the defendant be dangerous in the future; and (3) Was the defendant's conduct in the killing of the deceased unreasonable in response to provocation, if any provocation existed. The statute permitted the jury to consider mitigating evidence, but only with regard to the three questions. In fact, the statute itself limited mitigation to only the future dangerousness question. The scheme did not permit a jury to vote against a sentence of death on the basis of mitigating evidence, if the mitigating evidence did not apply to the three questions set out in former

ORS 163.150(b), or by the statute's terms to the second question only.

In *State v. Wagner*, 305 Or 115 (1988), ("*Wagner I*") the Oregon Supreme Court held that Oregon's death penalty scheme was constitutional. The defendant in *Wagner I*, like the Appellant in this case, contended that the scheme violated the United States Constitution because the jury was not presented with the issue of mitigation as a basis for a life sentence if the mitigation did not relate to the three death questions. The Oregon Supreme Court held that no fourth question presenting such consideration was permitted under the statute. As a result of the holdings of the Oregon Supreme Court and the judge at Appellant's first trial, there was no issue before the jury that sentenced Appellant the first time concerning mitigating evidence that did not relate to the three death questions.

In 1989, the United States Supreme Court decided *Penry v. Lynaugh*, 492 US 302 (1989). *Penry* concerned a Texas case. In 1988, the death penalty statutes in Texas and Oregon were almost identical. *Penry* held that the Texas trial court erred when it limited the mitigating evidence a jury could hear only to evidence that was relevant to the resolution of the three death questions. The United States Supreme Court held that the Eighth Amendment to the United States Constitution was violated when the jury was prevented from using mitigating evidence when it had to do with the issues other than those presented in the three death questions, in deciding whether the death penalty should be imposed. As a result of *Penry*, Oregon's death penalty statute was legislatively and judicially amended. A "fourth question" has been added to the statutory scheme. That question asks jurors to decide whether a death sentence should be imposed. The amended statute tells jurors that, in determining that issue, they are to answer the question "no" if, considering any aspect of the defendant's

character or background, or any circumstances of the offense, and considering victim impact evidence and any aggravating evidence, that a sentence of less than death would be appropriate.

In *United States v. Powell*, 894 F2d 895 (7th Cir.1990), Defendant Powell argued that the trial court had committed error when it excluded the transcript of the guilty plea hearing testimony of a witness whom the defense wished to call, who invoked the Fifth Amendment privilege against self-incrimination at the defendant's trial. In holding that the trial court had not committed error, the Seventh Circuit explained that the witness was unavailable within the meaning of Rule 804 of the Federal Rules of Evidence. The court then pointed out that in order to have the transcript of the prior testimony admitted under the Federal Rules of Evidence involving the hearsay exception for former testimony, FRE 804(b)(1), which is identical to OEC 804(b)(1), it was necessary to show that the prosecutor had a similar motive to interrogate the witness at the guilty plea hearing as he would have had at the defendant's trial. The Seventh Circuit rejected the defendant's contention that the prosecution had a similar motive, stating:

> ". . . The prosecution's motive at a guilty plea hearing is to assure that the plea is voluntary and that a factual basis exists for it . . . This responsibility, moreover, rests primarily with the trial judge . . . Here, although Heet denied it at his guilty plea hearing that he conspired with Powell and Saudy, he admitted to conspiring with others in committing the offenses in Counts One and Two of the Indictment. Thus, the government did have incentive to pursue the issue of Powell's involvement." *Id.*, at 901.

In the case at bar, the Oregon Supreme Court had held in *Wagner I, supra*, that Oregon's statute did not contain a fourth question that would present an issue to the jury concerning mitigating circumstances that did not bear on the three death

questions in the 1988 statute. It is this very failure of the 1988 statute to contain a "fourth question" that resulted in the reversal of Appellant's death sentence by the Oregon Supreme Court. *Guzek I*, 310 Or 299 (1990). As in *Powell*, Appellant's attorneys would not have had any incentive to introduce mitigating evidence that did not bear on the three death questions when they examined the witnesses in Appellant's first trial. In fact, in 1988, such evidence would have irrelevant to any of the issues before the jury and could have conceivably been subject to a proper objection or mistrial motion.

This Court has explained that " 'Opportunity' in the context of OEC 804(3)(a) refers to the legal or practical hurdles that would impede the examiner if the examiner were motivated to develop it, *e.g.*, witness asserted a privilege to prevent cross- examination or impeaching documents were not available." *State v. Pinnell*, 311 Or 98, 116 n.27 (1991). In Appellant's case, the opinion of this Court in *Pinnell*, would provide a legal barrier to inquiries concerning mitigating evidence that was not relevant to the three statutory death issues in effect at Appellant's first trial. In *Pinnell, supra*, 311 Or at 166 n. 28, this Court stated that " 'motive,' in the context of OEC 804(3)(a), refers to those tactical and strategic considerations that might reasonably influence the direction and extent of counsel's development of the testimony." Similarly, Appellant's attorney's knowledge - that the Oregon Supreme Court, on February 26, 1988 (while Appellant's first trial was underway)[2] had held that there was no provision in the Oregon death penalty statute for a jury to decide against imposing a death sentence because of mitigating factors not related to the three statutory questions - would influence the

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[2] Appellant's verdict of guilty on all nine counts was returned on March 3, 1988 [Case Register: Event No. 168].

attorney's strategy and tactics. The attorney would not ask questions which he knew related to irrelevant issues because he would expect objections by the prosecution to be sustained and because of ethical duties to avoid attempting to introduce improper evidence into a legal proceeding.

In any event, the death penalty scheme, as it existed in 1988, provided no motive for Appellant to inquire of any of the witnesses (Wilson, Cathey) with regard to any general mitigating circumstances.

Dayton Leroy Rogers was charged in one indictment with the murder of decedent Smith. In another indictment, he was charged with the murder of six other women. Rogers was tried first for the murder of Smith. He was found guilty of aggravated murder, but the jury answered "no" to the question "Is there a probability that the defendant, Dayton Leroy Rogers, would commit criminal acts of violence that would constitute a continuing threat to society?" As a result, Rogers did not receive the death penalty for the murder of Smith.

Prior to his trial for the murder of the six women, Rogers filed a motion to declare him ineligible for the death penalty on the grounds that the jury's verdict of "no" in the Smith murder trial precluded the state from re-litigating the issue of his future dangerousness in the trial for the murders of the six women. This Court rejected Rogers' argument because:

> "The issue presented by the second question in the present case differs from the second-question issue in the Smith case, because the sentencing jury in each case had to determine whether, based on everything in defendant's life to that point in time (including 'the extent of the mental and emotional pressure under which the defendant was acting at the time the killing was commited') defendant likely would be dangerous in the future . . . The trial in the present case took place nearly one year after

> the Smith homicide trial. Because everything that has occurred in a defendant's life may be relevant to a determination of that defendant's future dangerousness, the second-question determination necessarily incorporates a temporal element. The jury must determine a defendant's future dangerousness from the day on which the jury makes its determination forward, based on the defendant's life from that day backward. The year of defendant's life between the two trials and defendant's subsequent conviction in the guilt phase of this case had not yet occurred at the time the Smith homicide jury rendered its verdict." *State v. Rogers*, 313 Or 356 , 376-77 (1992) (*Rogers II*).

The holding in *Rogers II* affects Appellant's case. Appellant did not have an opportunity or motive to examine the witnesses at his first trial concerning matters that occurred after the first trial, because those events had not yet occurred. Because Appellant was deprived of this opportunity, the former testimony exception to the hearsay rule does not apply and the transcripts were not admissible under OEC 804. Since the hearsay exception did not permit the admission of the surrogate transcript testimony, both the Oregon and federal Confrontation Clauses were violated because the challenged statements would not satisfy a "firmly rooted" exception to the hearsay rule.

In *State v. Herrera*, 268 Or 349 (1979), this Court reversed a murder conviction for violation of a defendant's confrontation rights.

In *Herrera*, the trial court had allowed into evidence before the jury preliminary hearing testimony of a prosecution witness who testified under immunity, then claimed privilege against self-incrimination at trial when the state broke its promise. The state claimed on appeal that the witness was

unavailable and that, therefore, the prior testimony could be introduced. The Supreme Court disagreed stating:

> "The confrontation clause, while guaranteeing the defendant the right to confront a witness face-to-face is not without exception. One such exception under which prior recorded testimony which was subject to cross-examination may be introduced into evidence at trial exists when a witness is truly unavailable to testify at trial * * * However, because of the defendant's strong interest in confronting his accusers and the prosecutor's duty to provide a fair trial for the defendant and to protect the defendant's constitutional rights, the prosecutor's invocation of this exception cannot be granted routinely.
>
> "Before a prosecutor can use prior recorded testimony and thus deprive a defendant of his right at trial to confront his accusers face-to-face, he must first show the trial court that the use of the former testimony is a genuine necessity [* * *] The burden is on the prosecutor to show the trial court what circumstances exist which make use of the prior recorded testimony necessary." State v. Herrera, 286 Or at 355.

This Court in *Herrera* stated the vital interests protected by the right of confrontation. The first vital interest was described as:

> "The right of confrontation protects two vital interests of the defendant. First, it guarantees that the defendant has an opportunity to cross- examine the witness against him in order to test his sincerity, memory, ability to perceive and relate, and the factual basis of his statements. This purpose of confrontation helps to assure the accuracy of the result of the jurors' -determining process by giving the accused an opportunity to test the recollection and

conscience of a witness. *Barber v. Page*, 390 US 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)." *Herrera*, at 353.

In Appellant's case, he had the opportunity to cross-examine the witnesses in the guilt phase and the first penalty phase. However, this Court in *Herrera*, held that the right of confrontation protects a second vital interest which, as in the case of Appellant Herrera was violated for Appellant Guzek by admission of the surrogate transcript testimony:

> "The second interest of the defendant which the right to confrontation protects is enabling the defendant to demonstrate to the jury the witness' demeanor when confronted by the defendant so that the credibility of the witness is displayed in the courtroom. This second purpose is no less important than the first." *Id.*, at 354.

This Court cited with approval its holding in *State v. Smyth*, 286 Or 293 (1979):

> "In our system of justice a defendant is not tried on a dossiea compiled in prior hearings, no matter how thoroughly and judicially conducted. His guilt must be established at the trial by evidence that convinces a fact-finder beyond a reasonable doubt. But the earlier opportunity to question the witness will often avail little when the jury at the trial sees neither the witness nor the effect of the cross-examination recorded in a cold transcript. As the United States Supreme Court stated in Barber, '[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weight the demeanor of the witness.' 390 US 725, * * * ."

ORS 138.012(2)(b) is facially unconstitutional by providing in relevant part that a "transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding shall be admissible in

the new sentencing proceeding . . . ." The language of that statute is flatly irreconcilable with Article I Section 11, the Sixth and Fourteenth Amendments, *State v. Herrera, supra*, and *Barber v. Page, supra*.

In *State v. Douglas*, 310 Or 438, 444-45 (1990) the Appellant assigned as error the admission of an "unavailable" witness' testimony, which had previously been recorded in that Appellant's preliminary hearing. This Court disagreed with Douglas' contention that the challenged testimony did not meet the requirements of OEC 804(3)(a) that there had been an "opportunity and similar motive to develop the testimony" in the preliminary hearing. This Court found that the security release hearing did meet those requirements.

In *Douglas*, this Court held that Appellant had the opportunity at the security release hearing to cross-examine the witness, and availed himself of it fully. This Court also found that Douglas had a similar motive to cross-examine the witness at the security witness hearing because the parties and the pending charge were identical in the two proceedings. Like the trial court, this Court noted the security release hearing focuses on the question of defendant's guilt. Because release in a murder case will be denied if "the proof is evident or the presumption strong that the person is guilty" (ORS 135.240(2); Or.Const., Art., I Section 14), this Court "presume[d] that defendant sought the hearing because he wanted to be released. That is, not only was the central issue of guilt essentially the same, but also defendant's motive in having that issue decided in his favor at the security release hearing was similar to his motive at trial." *Douglas, supra*, at 455.

In *State v. Moen*, 309 Or 45, 84-86 (1990), this Court held that a preliminary hearing provides an opportunity to cross-examine witnesses and suggest the same motive to do so that is similar to the motive at trial. Because of the opportunity to

cross- examine the witness at the preliminary or security release hearings, this Court further held that confrontation rights under the state and federal constitutions are not violated by admitting such testimony during the guilt phase of the proceedings. *State v. Douglas, supra*, 309 Or at 445-46; *State v. Moen, supra*, 309 Or at 86.

As aforestated, the elements of (1) opportunity to cross-examine and (2) motive to cross-examine witnesses Wilson and Cathey were not the same in Appellant's first trial, and his most recent penalty phase hearing on remand.

As noted in the recitation in the pertinent portions of record for these assignments of error, co-defendants Wilson and Cathey, after they had received their life-saving sentences in exchange for their testimony against Appellant in his first trial, made a number of statements which were inconsistent with their prior testimony. These statements concerned whether Appellant was a "ring leader" who had master-minded the murders of the Housers, and ordered the co-defendants to kill. Allowing the transcript testimony permitted the state to present a one-sided theory to the jury, which supported the contention that Appellant was such a manipulative, ring-leading mastermind. Appellant was unable to cross-examine Wilson and Cathey regarding their subsequent inconsistent statements in that regard.

OEC 806 and its commentary make clear that Appellant should have been permitted to meet those claims, made in the absence of Wilson and Cathey at his remand hearing, by impeaching them. The trial court compounded the violation of Appellant's confrontation rights by not allowing the exhibits and testimony offered by Appellant in that regard.

The trial court's failure to admit the subject exhibits and testimony violated a number of Appellant's rights. The evidence is relevant under OEC 401, and was entitled to be

presented to the jury pursuant to ORS 163.150(1)(a) because it was "matter . . . relevant to sentence * * * ."

The proferred evidence rebutted the state's assertion that Appellant was the "ring leader" of a homicidal gang. The evidence, therefore, was within that which concerns Appellant's character and background, under *Wagner II*, 309 Or 5.

Appellant made specific offers of proof concerning the evidence he wanted to introduce. Oregon jurisprudence provides that an offer of proof can be a recitation by counsel of what the witness would say, or testimony by the witness. *State v. Phillips*, 314 Or 460, 466, 840 P2d 666 (1992); *State v. Affeld*, 307 Or 125, 128, 764 P2d 220 (1988); *State v. Olmstead*, 310 Or 455, 461 (1990).

The trial court's error precluded Appellant from introducing evidence relevant to the appropriate sentence he should receive, contrary to ORS 163.150(1) and OEC 401.

The trial court's rulings also violated Appellant's rights to be heard and to present a defense under Article I, Section 11 of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, as well as his rights to confront and cross-examine the witnesses against him under those same constitutional provisions, and denied him due process. In Appellant's first trial, co-defendants Wilson and Cathey provided the evidence which convicted him and led to his death sentence, in what would have otherwise have been an entirely circumstantial case. The fact that co-defendant Wilson had recanted his testimony, at least partially, with regard to whether Appellant's involvement in the crime was as a ringleader, was extremely relevant and was certainly a mitigating factor. At the very least, it was a subsequent inconsistent statement which would have been

very powerful in the impeachment of Wilson's and Cathey's surrogate testimony by transcript.

Allowing the surrogate testimony by transcript of Wilson, while excluding his subsequent inconsistent statements; was an inconsistent ruling. Wilson's statements were inconsistent with his previous testimony, and Wilson had been ruled unavailable as a witness by the trial court. The result of this one-sided set of evidentiary rulings was that the state was granted a non-reciprocal benefit to present unimpeached material testimony which was critical to the jury's determination as to whether Appellant should die.

This controvened the rule of *Wardius v. Oregon, supra*, in violation of the due process clause of the Fourteenth Amendment. Further, because Appellant could not have known in his first trial that Wilson would subsequently change his statements, the due process clause was violated for that reason also.

Appellant was, therefore, also denied a reliable adjudication of an appropriate sentence under the Eighth Amendment because the jury was not allowed to consider this evidence in deciding the punishment. *Jurek v.Texas*, 428 US 262, 271 (1976); *Turner v. Murray*, 476 US 28, 33-34 (1986).

Appellant here had "no opportunity to deny or explain" or even impeach the statements of Wilson and Cathey. He could not "appropriately create any other opportunity to meet what was not in the case," *State v. Tucker*, 315 Or 321, 353 [Fadely, J., dissenting, citing *Chambers Mississippi*, v. 410 US 284, 302-03 (1973)], when the court not only disallowed his offers of proof concerning Wilson and Cathey, but additionally denied Appellant the right to present alibi evidence to challenge the co- defendants' transcript testimony.

As the United States Supreme Court stated, in overturning the conviction in Chambers:

> "Few rights are more fundamental than that of an accused to put on a fence... where constitutional rights directly affecting the ascertainment of [outcome] are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice . . . exclusion of this critical evidence . . . denied . . . fundamental standards of due process . . . . and . . . deprived *Chambers* of a fair trial." Chambers, 410 US at 302-03.

As noted, ante, the plea agreements of Wilson and Cathey were admitted into evidence. Relevant paragraphs of those plea agreements recited that Wilson and Cathey were required thereunder to testify truthfully against Appellant, under the penalty of having their life-saving plea agreements revoked if they failed to do so. Although Wilson and Cathey refused to testify at Appellant's subsequent penalty hearings, the state has never sought to revoke those plea agreements. Nonetheless, their admission before the jury constituted reversable error.

In *State v. Charboneau*, this Court reversed convictions for aggravated murder and murder, where the only eye witness to the murder testified in detail as to Charboneau's personal participation in the murder, and the trial court allowed the state to introduce into evidence the plea agreement of the eye witness which recited the state's belief that the eye witness' representations accurately stated his involvement in the crime. *State v. Charboneau*, 323 Or at 42-43, 50, 913 P.2d 308 (1996).

In *State v. Wilson*, 323 Or 498, 918 P2d 826 (1996), Charboneau's co- defendant's convictions for aggravated murder and murder, of the same victim, were reversed for precisely the same reason.

In *Charboneau* and *Wilson*, this Court noted that the eyewitness whose plea agreement had been introduced by the state, was the only eyewitness to the murder who testified in detail as to the defendants' personal participation therein, thereby providing the crucial evidence that tied the defendants to the murder. Under those circumstances, this Court held the error was prejudicial, requiring reversal of the convictions.

This Court based its ruling on the proposition that a "witness' testimony or exhibit may not, explicitly and directly, contain an opinion as to a trial witness' credibility." Wilson, 323 Or at 502; Charboneau, 323 Or at 48.

Here, the plea agreements comment on Wilson's and Cathey's credibility was a reference to pre-testimonial polygraphs. Appellant urges that admitting into evidence a recitation that Wilson and Cathey must "testify truthfully" concerning Appellant's guilt, is tantamount to such a direct and explicit comment.

Appellant urges this Court to reach the merits on this issue on the grounds that it constitutes "plain error," which is "apparent on the face of the record." ORAP 5.45(2); see also, *State v. Brailey*, 224 Or 1, 9 (1960).

Accordingly, Appellant's rights under the Confrontation Clauses of the state and federal constitutions, and his right to be heard and to present critical evidence as part of a complete defense under Article I, Section 11 and the Due Process Clause, were violated. Therefore, his sentences of death should be vacated.

* * * * *